

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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NICHOLAS M.,

Plaintiff,

v.

1:19-CV-355(TWD)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

OLINSKY LAW GROUP  
for Plaintiff  
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Special Assistant

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

**ORDER**

Presently before the Court in this action, in which Plaintiff seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. §405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on July 16, 2020, during a telephone conference at which a court reporter was

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

present. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found the Commissioner's determination resulted from the application of proper legal principles and was supported by substantial evidence, and I provided further detail regarding my reasoning and addressing the specific issues raised by the Plaintiff in his appeal.

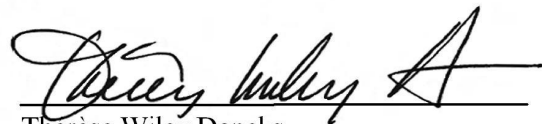
After due deliberation, and based upon the Court's oral bench decision, which has been transcribed, is attached to this Order and is incorporated in its entirety by reference herein, it is hereby,

**ORDERED**, as follows:

- (1) Defendant's motion for judgment on the pleadings is **GRANTED**;
- (2) The Commissioner's determination that Plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is **AFFIRMED**; and
- (3) The Clerk is directed to enter judgment, based upon this determination, dismissing Plaintiff's complaint in its entirety.

SO ORDERED.

Dated: July 23, 2020  
Syracuse, New York

A handwritten signature in black ink, appearing to read "Therese Wiley Dancks", written over a horizontal line.

Therese Wiley Dancks  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
NICHOLAS J. M.,

Plaintiff,

vs.

1:19-CV-355

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

DECISION - July 16, 2020

James Hanley Federal Building, Syracuse, New York

HONORABLE THÉRÈSE WILEY DANCKS

United States Magistrate Judge, Presiding

APPEARANCES (by telephone)

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1           THE COURT: I have before me a request for judicial  
2 review of an adverse determination by the Acting Commissioner  
3 under 42, United States Code, Section 405(g).

4           The background is as follows: The plaintiff was  
5 born in November of 1982 and is currently 37 years old. He  
6 was 32 years old at the onset of his alleged disability. He  
7 completed some high school and he has a GED. He has not  
8 engaged in substantial gainful activity since the alleged  
9 onset date. He has worked jobs since then in the auto  
10 service industry and as a groundskeeper, but those jobs did  
11 not rise to the level of substantial gainful activity. In  
12 his application for benefits, he indicated he suffers from  
13 traumatic brain injury, neck pain and stiffness, right sided  
14 numbness, and balance problems.

15           Procedurally, the plaintiff filed for Title II  
16 benefits on July 13, 2016, alleging disability beginning  
17 specifically on March 15, 2015. A hearing was conducted by  
18 Administrative Law Judge Asad Ba-Yunus on December 20, 2017,  
19 wherein plaintiff testified, as did a vocational expert.  
20 Plaintiff was represented by an attorney at that hearing who  
21 also represented plaintiff through the Appeals Council  
22 process. ALJ Ba-Yunus issued a decision on March 22, 2018,  
23 finding the plaintiff was not disabled at the relevant times.  
24 The Social Security Administration made that a final  
25 determination of the Agency by the Appeals Council's

1 January 22, 2019 denial of plaintiff's request for review.  
2 This timely District Court action followed.

3 ALJ Ba-Yunus applied the five-step sequential test  
4 for determining disability. At step one, he found plaintiff  
5 had not engaged in substantial gainful activity since the  
6 onset date of disability. At step two, he concluded that  
7 plaintiff suffers from several severe conditions secondary to  
8 a motor vehicle accident, including traumatic brain injury  
9 with subarachnoid hemorrhage, status post left occipital  
10 condyle fracture, status post right tibia/fibula fracture  
11 requiring reduction and internal fixation surgery, ankle and  
12 hip dislocation with reduction, right sided numbness,  
13 deficits in balancing, and post traumatic epileptic seizures.  
14 At step three, the ALJ concluded that plaintiff's conditions  
15 do not meet or medically equal any of the listed  
16 presumptively disabling conditions, considering several  
17 physical and mental health listings. Then after a review of  
18 the record evidence, the ALJ determined plaintiff is capable  
19 of performing light work but with several detailed additional  
20 postural and non-exertional limitations considering his  
21 physical and mental abilities. At step four, the ALJ  
22 concluded plaintiff could not perform any of his past  
23 relevant work. At step five, the ALJ applied the  
24 Medical-Vocational Guidelines as well as obtained testimony  
25 from a vocational expert, and concluded that the plaintiff

1 was not disabled.

2 As relevant to the time period in question,  
3 plaintiff was treated at Albany Medical Center and at Glens  
4 Falls Hospital after his motor vehicle accident. He also  
5 received physical and occupational therapy at Glens Falls  
6 Rehabilitation and Wellness Center. He treated with various  
7 providers at Adirondack Rehabilitation Medicine, and also  
8 treated with neurologist Dr. Francisco Gomez of Gomez  
9 Neurology, primary care physician Dr. Thomas Portuese of  
10 Hudson Headwaters Health Network, and neurosurgeon Dr. John  
11 German of Albany Medical Center. Diagnostic studies  
12 performed include an EMG in June of 2013, two EEGs, one in  
13 June of 2013 and the other in December of 2017, MRIs of the  
14 brain and cervical spine, and various other X-rays. A  
15 neuropsychological evaluation was conducted by psychologist  
16 Dr. Phyllis Broege in November of 2017, who also provided a  
17 source statement. Other opinions in the record are from  
18 treating physician Dr. Portuese; occupational medicine  
19 consultant Dr. William Rogers, who opined on plaintiff's  
20 physical limitations; and psychologist Dr. Thomas Osika, who  
21 conducted a psychological evaluation. Agency record reviewer  
22 psychologist Dr. M. Momot-Baker also provided an opinion  
23 regarding plaintiff's limitations.

24 I've reviewed the record carefully, and in light of  
25 the arguments of counsel and what counsel have presented in

1 their briefs, I have applied the requisite deferential  
2 standard which requires me to determine whether proper legal  
3 principles were applied and whether the result is supported  
4 by substantial evidence.

5 I'll turn first to the plaintiff's argument that  
6 the ALJ erred in the determination of the plaintiff's  
7 residual functional capacity, or RFC, and specifically that  
8 the ALJ did not give proper weight to the opinion evidence.

9 I've done a thorough and searching review of the  
10 record and find that the ALJ did properly assess the medical  
11 and non-medical evidence of record and the RFC is supported  
12 by substantial evidence. The ALJ thoroughly discussed the  
13 medical evidence and other evidence of record, formulated the  
14 RFC based upon an assessment of all medical and non-medical  
15 evidence as a whole for the relevant time period, and  
16 thoroughly explained his analysis in arriving at the RFC.

17 The ALJ's decision shows he considered plaintiff's  
18 testimony, his adult function report, his activities, and all  
19 treatment records for the relevant period. He noted  
20 plaintiff had a history of a motor vehicle accident causing  
21 numerous serious injuries and the need for multiple  
22 surgeries. He credited examining consulting psychologist  
23 Dr. Osika's opinion with significant weight and also gave  
24 significant weight to non-examining Agency psychologist  
25 Dr. Momot-Baker. He gave very little weight to the opinion

1 of psychologist Dr. Broege, who performed a  
2 neuropsychological evaluation at the referral of primary care  
3 physician Dr. Portuese. The ALJ also gave little weight to  
4 the opinion of Dr. Portuese.

5 Plaintiff argued the ALJ's assessment of  
6 Dr. Momot-Baker's opinion was improper because he accorded  
7 more weight to it than to the opinions of examining and  
8 treating providers and because the opinion was inconsistent  
9 with the opinions of Dr. Broege and Dr. Portuese. Plaintiff  
10 also argues the RFC was not consistent with Dr. Osika's  
11 opinion, which was accorded significant weight. For the  
12 following reasons, I find these arguments unpersuasive.

13 Initially, I note that the ALJ is not required to  
14 accept every limitation assessed by an examining consultant.  
15 Next, I note that the psychological exam by Dr. Osika, to  
16 which significant weight was given, was largely unremarkable.  
17 While Dr. Osika noted plaintiff reported having trouble with  
18 his memory and trouble following directions since the motor  
19 vehicle accident, Dr. Osika noted plaintiff drove himself  
20 alone to the appointment. Plaintiff was casually dressed  
21 with adequate hygiene. His speech was fluent, coherent and  
22 logical, and his insight and judgment were fair to good. He  
23 was fully oriented in all spheres and alert, and there were  
24 no signs of delusions, hallucinations, obsessions or  
25 compulsions. His mood and affect were mildly dysphoric and,



1 as plaintiff reported, he had trouble with concentration and  
2 energy level. In describing and assessing plaintiff's  
3 functional abilities, Dr. Osika noted that plaintiff had  
4 trouble with balance and had a hard time doing chores around  
5 the house, but he did accomplish some maintenance and yard  
6 work, watched television, played with his dogs, and spent  
7 some time with his family and friends. Dr. Osika thought  
8 plaintiff would benefit from counseling and that it may be  
9 helpful to have a more extensive evaluation of his memory and  
10 concentration to elicit his strengths and weaknesses, but  
11 overall Dr. Osika opined that plaintiff would have mild  
12 difficulty with simple tasks and moderate difficulty with  
13 complex tasks. Dr. Osika also opined plaintiff would have  
14 mild difficulty with the ability to interact with people in  
15 the workplace.

16 Notably, psychiatric and mental exams by other  
17 providers were largely unremarkable. For example, on  
18 multiple dates of treatment during the relevant time period,  
19 Dr. German and other providers at Albany Medical Center's  
20 neurosurgery service found plaintiff pleasant, fully alert  
21 and oriented, and with clear, fluent and appropriate speech.  
22 Although plaintiff complained of mild memory difficulties,  
23 Dr. German repeatedly noted he followed complex commands  
24 without difficulty and he asked and answered questions  
25 appropriately. Neurologist Dr. Gomez noted plaintiff on

1 multiple office encounters to be completely alert, oriented  
2 and cooperative. Dr. Gomez also noted plaintiff's speech,  
3 concentration, recent and remote memory appeared normal to  
4 conversation. In April 2017 plaintiff reported he felt  
5 better, although he complained of some memory issues, and an  
6 ambulatory EEG in December of 2017 showed some mild epileptic  
7 activity. The approximately 22 encounter notes of treating  
8 physician Dr. Portuese from June 2013 to July of 2016 all  
9 show that plaintiff had good judgment and he was always  
10 active, alert and fully oriented. Dr. Portuese also  
11 consistently noted plaintiff's recent and remote memories  
12 were entirely normal.

13 Dr. Portuese provided a source statement in which  
14 he opined plaintiff would be 10 percent off task except for  
15 being 15 to 20 percent off task in maintaining a regular work  
16 schedule, understanding and carrying out simple instructions,  
17 maintaining concentration to complete tasks in a timely  
18 manner, meeting minimum accuracy and quality standards,  
19 responding appropriately to changes in a routine work  
20 setting, and dealing with normal work stress. The ALJ gave  
21 little weight to this opinion since it was not supported by  
22 the majority of the record, including Dr. Portuese's own  
23 treatment notes showing intact memory and concentration, and  
24 the opinion was inconsistent with diagnostic tests including  
25 the tests showing that plaintiff's seizure actives are short,

1 infrequent and not debilitating, and his brain MRIs were also  
2 largely normal. For the same reasons, the ALJ found the  
3 source statement provided by psychologist Dr. Broege should  
4 be accorded very little weight. Her findings too were  
5 inconsistent with the majority of the record as I've outlined  
6 above.

7           Plaintiff also takes issue with the ALJ giving  
8 significant weight to the opinion of non-examining Agency  
9 consultant Dr. Momot-Baker, arguing that it is not consistent  
10 with the record as a whole, pointing to the opinions of  
11 Dr. Broege and Dr. Osika, who indicated plaintiff would have  
12 difficulty with simple instructions. However, as noted  
13 earlier, Dr. Osika opined that plaintiff would have only mild  
14 difficulty with simple tasks and moderate difficulty with  
15 complex tasks. This is consistent with Dr. Momot-Baker's  
16 opinion that plaintiff would be limited to simple and some  
17 detailed instructions, and that plaintiff had moderate  
18 limitation in the ability to understand, remember and carry  
19 out detailed instructions. Dr. Momot-Baker's opinion is also  
20 consistent with the records I've already outlined indicating  
21 some issues with memory and cognition that would not disrupt  
22 plaintiff's ability to perform semi-skilled work, the  
23 multiple examinations by his treating providers Drs. German  
24 and Portuese showing plaintiff had good judgment, intact  
25 memory, and that plaintiff could follow complex commands

1 without difficulty and ask and answer questions  
2 appropriately. Further, relevant diagnostic tests show that  
3 his brain MRIs were normal, as I've stated, and his EEGs and  
4 follow-up treatment notes show his seizures treated with  
5 medication were short, infrequent and not debilitating.

6 Further regarding plaintiff's argument that the ALJ  
7 erred in giving significant weight to Dr. Momot-Baker's  
8 opinion because Dr. Momot-Baker did not examine the  
9 plaintiff, I disagree. While it is correct that  
10 Dr. Momot-Baker did not personally examine the plaintiff, it  
11 is well settled that the opinions of state Agency consultants  
12 can be given weight if supported by medical evidence and  
13 other evidence of record. The ALJ clearly stated, and the  
14 record supports, that he gave weight to Dr. Momot-Baker's  
15 opinion because it was supported by the record evidence as  
16 I've outlined already.

17 Further supporting the weight given to  
18 Dr. Momot-Baker's opinion and the opinion of Dr. Osika and  
19 the overall RFC are the plaintiff's reported daily  
20 activities. Plaintiff indicated he was able to follow  
21 written and spoken instructions, and he was able to perform  
22 some work, albeit not at the level of substantial gainful  
23 activity. Plaintiff reported he was able to cook on a daily  
24 basis, go shopping, drive himself and by himself, manage  
25 money, and go out alone. Plaintiff reported in his function

1 report and to his providers that he was the primary care  
2 giver of one of his children. He had no problems completing  
3 household chores, although he needed a riding lawnmower, and  
4 he could still do the hobbies of carpentry and car detailing  
5 and repairs.

6 I also note that there is no requirement that the  
7 ALJ accept every limitation in the opinion of a medical  
8 source or a consultative examiner. Nor must the RFC  
9 identically track any one of those opinions. The ALJ has the  
10 responsibility of reviewing all of the evidence before him,  
11 resolving inconsistencies, and making a determination  
12 consistent with the evidence as a whole. Stated another way,  
13 it is the ALJ's responsibility to weigh the various opinions  
14 along with other evidence and determine which limitations  
15 were supported by the overall evidence of record. The Court  
16 cannot reweigh the evidence under the substantial evidence  
17 review standard. Here, the ALJ considered all of the  
18 opinions and other evidence of record when determining  
19 plaintiff's overall RFC including the mental limitations.

20 I also find the ALJ did not err in considering  
21 plaintiff's ability to work in some capacity during the  
22 relevant time period given that it is a proper factor to  
23 consider in assessing the claim. I find the RFC is supported  
24 by the opinions, other medical records, and the non-medical  
25 evidence since plaintiff is limited to semi-skilled tasks,

1 may only have frequent interaction with the public, and he  
2 can tolerate occasional changes to a routine work setting.

3 I also find all of the treatment briefly outlined  
4 above was thoroughly reviewed by the ALJ and the records  
5 provide clear and substantial evidence to support the RFC  
6 determination such that meaningful review is possible. In  
7 *Cichocki versus Astrue*, 729 F.3d 172, the Second Circuit  
8 stated that only where the reviewing court is unable to  
9 fathom the ALJ's rationale in relation to the evidence in the  
10 record would remand be appropriate for further findings or  
11 clearer explanation for the decision. As I stated, I find  
12 that the ALJ's analysis regarding plaintiff's functional  
13 limitations and restrictions afford an adequate basis for  
14 meaningful judicial review, applies the proper standards, and  
15 is supported by substantial evidence such that additional  
16 analysis would be unnecessary or superfluous.

17 All in all, I find that the ALJ properly weighed  
18 the opinions of record for the relevant period, gave good  
19 reasons for the weight given to the opinions, and the ALJ  
20 considered all of the medical evidence showing mostly limited  
21 findings on the mental examinations. The ALJ also properly  
22 considered plaintiff's own reported activities per his  
23 testimony, his function report, and as he reported to his  
24 providers. All of this supports the ALJ's determination of  
25 the plaintiff's RFC. In short, I find the ALJ properly

1 explained the reasons for the RFC. And in light of the  
2 foregoing and considering the entire record, I find the ALJ  
3 applied the appropriate legal standards of review in  
4 determining plaintiff's RFC and the RFC is supported by  
5 substantial evidence.

6 Lastly, I find plaintiff's contention regarding the  
7 Appointments Clause of the United States Constitution to be  
8 without merit. Here, plaintiff essentially argues that the  
9 ALJ did not exercise lawful authority in denying his claim  
10 because the ALJ was an inferior officer who was not properly  
11 appointed pursuant to the Appointments Clause. As such,  
12 plaintiff argues this case must be remanded to a different  
13 ALJ who has been constitutionally appointed. The defendant  
14 counters that plaintiff forfeited his Appointments Clause  
15 claim because he failed to assert this challenge during the  
16 administrative proceedings.

17 The Court is aware that courts in this circuit and  
18 other Circuit Courts differ on this issue. For example, the  
19 Third Circuit Court of Appeals has adopted plaintiff's view  
20 in *Cirko versus Commissioner*, 948 F.3d 148. The  
21 Eighth Circuit, in *Davis versus Saul*, a recent opinion at  
22 2020 WL 3479626, the Court there recently ruled that  
23 constitutional claims must be presented in Agency proceedings  
24 as argued by the Commissioner here. I have considered all of  
25 the rulings speaking to this issue and find that plaintiff

1 was required to raise the Appointments Clause issue at the  
2 Agency level prior to raising it in federal court. I agree  
3 with the arguments of the Commissioner as set forth in his  
4 brief, and I also fully adopt the reasoning of my colleague,  
5 Magistrate Judge Baxter, as set forth in his recent decision  
6 of *Danielle R. versus Commissioner*, 2020 WL 2062138. Also,  
7 even if I were to credit the plaintiff's argument that he  
8 could not have raised this challenge at the Agency level  
9 because his deadline to submit evidence to the Appeals  
10 Council expired one month before the case of *Lucia versus*  
11 *SEC*, 138 S.Ct. 2044, on which he relies, was decided, the  
12 argument still fails because the *Lucia* case was, however,  
13 decided before the Appeals Council's denial of review in this  
14 case.

15 For these reasons, I conclude that this is not one  
16 of the rare cases as described in *Freytag versus Internal*  
17 *Revenue*, 501 U.S. 868, where a court should excuse  
18 plaintiff's failure to raise an Appointments Clause claim  
19 during the administrative process. Accordingly, plaintiff is  
20 not entitled to remand based upon an alleged violation of the  
21 Appointments Clause.

22 So, I grant defendant's motion for judgment on the  
23 pleadings and will enter a judgment dismissing plaintiff's  
24 complaint in this action. A copy of the transcript of my  
25 decision will be attached to the order should any appeal be



1 taken from my determination.

2  
3 \* \* \*

4  
5 C E R T I F I C A T I O N

6  
7 I, EILEEN MCDONOUGH, RPR, CRR, Federal Official  
8 Realtime Court Reporter, in and for the United States  
9 District Court for the Northern District of New York,  
10 do hereby certify that pursuant to Section 753, Title 28,  
11 United States Code, that the foregoing is a true and correct  
12 transcript of the stenographically reported proceedings held  
13 in the above-entitled matter and that the transcript page  
14 format is in conformance with the regulations of the  
15 Judicial Conference of the United States.

16  
17  
18  
19 *Eileen McDonough*

20 EILEEN MCDONOUGH, RPR, CRR  
21 Federal Official Court Reporter  
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